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PACIFIC TELESIS
Group-Washington

October 3, 1996

EX PARTE

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Please associate the attached material with the above referenced proceedings.

We are submitting two copies of this notice in accordance with Section 1.1206(a)(1) of the Commission's Rules. Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

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PACIFIC TELESIS
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October 3, 1996

A. Richard Metzger, Jr.
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Mr. Metzger:

On behalf of Pacific Telesis Group, we write to provide further information on our company's positions with regard to Customer Proprietary Network Information ("CPNI") in response to requests made to us by members of the Common Carrier Bureau staff during our recent ex parte meetings.

We make the following points below:

- The Commission has authority to allow carriers to obtain "approval" to use CPNI by way of a "notice and opt out" mechanism. We cite established precedent showing why such approval is permissible under 47 U.S.C. Section 222 and describe how the mechanics of such a notice would work.

- The Commission should revise the categories, or "buckets," of "telecommunications services" it adopts so that the local exchange and interexchange "buckets" merge once Bell Operating Companies ("BOCs") and interexchange carriers ("IXCs") are allowed to provide both local and long distance services in a particular BOC's territory. Likewise, when wireless service becomes more widely used as a complete substitute for wireline service, it may become inappropriate to maintain commercial mobile radio services ("CMRS") as a separate "bucket."

- Credit information should not be characterized as CPNI.

- The privacy protections of Section 222 reside primarily in the prohibition on disclosure of CPNI to third parties. Where a customer is solicited by a third-party carrier with which it does not have an existing business relationship, to avoid "slamming" complaints, a customer should affirmatively respond to such solicitation before that customer is migrated to the new carrier.

- Section 222 allows a carrier to share CPNI with its affiliates if it receives "approval" from a customer to do so.

The Commission Has Authority To Allow Carriers To Obtain "Approval" To Use CPNI By Way Of A "Notice And Opt Out" Mechanism

There is ample precedent for finding that approval may be obtained by way of a notice and opt out mechanism:

> A recent NTIA report lends support to a notice and opt out approval procedure. According to the NTIA Report entitled "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information ('TRPI')," at 25, "a company should be allowed to use *non-sensitive TRPI* for unrelated purposes *unless the customer affected, having been notified of the company's plans, takes some action stopping such use*—such as making a telephone call or mailing in a form—by a certain date." (Emphasis added.) The NTIA's illustrative list of the types of information that constitute sensitive TRPI—"information relating to health care (e.g., medical diagnoses and treatments), political persuasion, sexual matters and orientation, and personal finances (e.g., credit card numbers) . . ."—should be construed to exclude CPNI. *See id.* at 25 n.98.
>
> The RBOCs currently are allowed to use a notice and opt out mechanism for business customers having between two and twenty lines.
>
> The Commission has said that requiring affirmative consent for internal use of CPNI effectively requires structural separation of activities, which is not required for all lines of business in which carriers engage. "Under a prior authorization rule, a large majority of mass market customers *are likely to have their CPNI restricted through inaction*, and in order to serve them the BOCs would have to staff their business offices with network-services-only representatives, and establish separate marketing and sales forces for enhanced services." *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order* ("*Computer III Remand*"), 6 FCC Rcd 7571, ¶ 85 n.155 (1991) (Emphasis added). "[A] prior authorization rule would vitiate a BOC's ability to achieve efficiencies through integrated marketing to smaller customers—one of the benefits sought through adoption of nonstructural safeguards rather than structural separation." *Id.*

"Opt out" mechanisms are common in the context of class action lawsuits, in which potential class members must affirmatively inform the class representative if they do not wish to remain a part of the class. Fed. R. Civ. P. 23(c)(2).

Notice and opt-out is recognized in a variety of commercial contexts where the supplier and customer have an established business relationship. For example, the Commission's "pay-per-call" rules under section 228 of the Act involve a form of notice and opt-out, by requiring carriers to give notice to subscribers of their rights to block pay per call services, from which they may then "opt-out." *See* 47 C.F.R. 64.1509.

Many goods are sold under "negative option plans," such as those used by book and record clubs. The customer first establishes a relationship with the seller that provides for items to be sent on a regular basis. The FTC's rules for these plans require that each item be handled by a notice and opt-out procedure. Specifically, consumers are given clear and conspicuous notice that they will receive a selection, and designation of a procedure by which the subscriber can decline a particular selection. *See* 16 C.F.R. 425.1.

Also, in the case of mail or telephone order merchandise, once the business relationship is established by ordering goods, the FTC specifies that if a shipment is to be delayed, the seller must give notice of a shipping delay and of the buyer's right to cancel. the buyer may then "opt-out" of the contract to purchase the goods. *See* 16 C.F.R. 435.1.

Notice and opt-out is also used in the context of established credit card business relationships. Under Federal Reserve Regulation Z, a credit card provider must give notice of changes in terms and annual renewal fees, with the card holder having the option to "opt-out" of further use of the card. *See* 12 C.F.R. 226.9.

While most competitors who have commented in this proceeding recognize the benefits to all consumers of notice and opt-out, a few seek to hamstring the incumbent carriers by requiring that they must obtain advance written approval to use CPNI internally. A notice and opt-out mechanism will advance the cause of competition. The 1996 Act contemplates that incumbent local exchange carriers will become vigorous competitors in long distance markets, and specifically provides for BOC entry into interLATA services. Similarly, Congress expects interexchange carriers to spearhead the introduction of local competition. BOC and other incumbent local exchange carrier ("ILEC") entry into interLATA markets will be greatly enhanced if those carriers can use their customer contacts related to local service to also market interLATA services, in order to challenge the large, established interexchange carriers. It is this joint marketing relationship that some competitors object to (although it is specifically authorized in the 1996 Act).

The best prospects for all carriers (including BOCs, ILECs, IXCs, and cable companies) to enter new competitive areas are their existing customers. Existing carriers will be able to reach their customers to offer services outside their traditional "buckets" most efficiently if they are able to use their CPNI in their marketing efforts. Such marketing, on a large scale, is absolutely essential if the goal of competition is to be introduced quickly. Realistically, carriers will be able to use their CPNI most efficiently under flexible guidelines for customer approval of such use, including notice and opt-out. An opt-in process demands more effort by consumers to approve use of their CPNI, and many will fail to respond to notices out of inertia. Under these circumstances, it will be very costly for carriers to gain customer approval, thus making their marketing much less efficient.

At the same time, customers will have the ability to stop use of their CPNI for such marketing if they so desire. It is unlikely that many customers feel they have a strong privacy interest in preventing interLATA marketing from their telephone company where intraLATA marketing is allowed. Indeed, from the consumer perspective, the distinction between intraLATA (particularly intraLATA toll) and interLATA calling may be artificial and confusing and it is difficult to imagine that a customer would feel he or she has a privacy interest in his or her intraLATA local and toll CPNI not being used to market interLATA services. Consumers who object to receiving telemarketing calls concerning intraLATA, interLATA, or any other service are best protected by the Telephone Consumer Protection Act ("TCPA," section 227 of the Act) and the Commission's rules implementing the TCPA. Those rules allow any business to make telephone solicitations and protect consumer privacy via what is essentially a notice and opt-out scheme.[1]

Obtaining approval by way of a notice and opt-out procedure is appropriate despite claims that a BOC obtained its customers because it was the monopoly provider. It would pervert the balance struck by Congress between privacy and competition to forbid notice and opt-out approval simply as a means of handicapping BOCs.

Privacy is not a relevant concern on this question. Customers certainly have no different expectations about how their CPNI may be used, or how approval to use it may be obtained, depending on whether the carrier has historically been the only provider. If anything, experience suggests that customers have generally high confidence in their traditional supplier of local telephone service and their privacy concerns relate to releasing CPNI to other parties.

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[1] For example, a company may make a call to a person with whom the company has an established business arrangement. Subscribers have the ability to "opt-out" from receiving such calls by terminating the arrangement. For other calls, a person making telephone solicitations must maintain a do-not-call list and honor requests from residential subscribers not to receive further calls, another form of "opt-out." *See* 47 C.F.R. 64.1200.

Regarding competition, the Section 222(c)(1) approval process is not intended to provide a safeguard against cross subsidy by incumbent carriers or otherwise protect competitors. It applies equally to all telecommunications carriers and is intended to balance customer privacy with the interest of the carrier holding the CPNI. This contrasts with Sections 222(c)(3) and 222(e), relating to aggregate customer information and subscriber lists, where Congress specifically provided for exchange carriers to give their competitors access to such information. Other sections of the Act, particularly the safeguards in Sections 251, 260, 271, and 272, fully deal with the issue of BOC entry into interLATA services. There is no need to twist the plain meaning of 222(c) as a means of adding additional hurdles to market entry beyond the safeguards wanted by Congress.

There should be no reason why carriers and customers are constrained to a limited scope of approval. A carrier should be free to seek, and a customer free to approve, use of CPNI for any service provided by that carrier or its affiliates. Clearly, a customer has the ability to rescind its approval at any time. To the extent there is any concern about customers granting broad approvals under an opt-out approach, this concern could be met by periodic non-burdensome reminders contained in bills.

The contrasting wording of the Section 222 provisions relating to "use" (Section (c)(1)) and "disclosure" (Section (c)(2)) of CPNI also support our position. Because Congress requires an "affirmative written request" for disclosure of CPNI to third parties, but only "approval" to use it internally, Congress intended to give carriers latitude in how they obtain approval. Otherwise, Congress easily could have qualified the term "approval" in Section (c)(1) with the words "affirmative," "written," or "request."

The Commission Should Revise The Categories, Or "Buckets," Of "Telecommunications Services" Over Time

We ask that the Commission revise its "telecommunications service categories," or "buckets" as technology and regulations evolve. In time, as the Act envisions, the BOCs will provide interLATA services and will be able to joint market local and long distance services or provide them on an integrated basis. Similarly, existing IXCs and other competitive carriers are expected to provide local exchange services using their own facilities and resold BOC network elements. In some cases, pricing may become less distance sensitive. Thus, customer perceptions of what constitutes a "telecommunications service" are likely to change, and keeping local and long distance in separate buckets may no longer make sense. The local and long distance "buckets" should merge once both a BOC and IXCs are allowed to offer both local and long distance in the BOC's territory. However, this merger should not take place in a way that skews competition unfairly. For reasons of competitive parity, the buckets should not merge before the point that both BOCs and IXCs are allowed into each others' business.

Likewise, when wireless service becomes more widely used as a complete substitute for wireline service, it may become inappropriate to maintain CMRS as a separate "bucket."

Credit Information Should Not Be Characterized As CPNI

We advocate that the Commission specifically exclude credit information from the definition of CPNI, as it did in the preexisting CPNI rules.

Credit information is a term that includes the information the carrier obtained at the time the service was installed in order to verify credit-worthiness. It may include such things as a Social Security Number, driver's license number, employment information, can be reached numbers, home ownership, and the like. The term also may include a record of bill collection steps that may have been taken over a specific period of time, the presence of a deposit, etc. Each carrier should develop this information on its own, and the information collected should not be shared with other firms.

Credit information does not fit the definition of CPNI set forth in Section 222(f)(1). CPNI is

> "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and
>
> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier."

Carriers are not credit reporting agencies, and we are concerned that if CPNI includes credit information, we will be required to disclose credit information upon "affirmative written request" under Section 222(c)(2). The credit information may have been gathered upon initiation of telephone service, and may no longer be accurate. Unlike what occurs with credit reporting agencies, where customers may examine their records from time to time, update them, and dispute inaccuracies, there is no regulatory mechanism to update the credit information. It could disadvantage both our customers, and our business, to release this information to third parties.

The Privacy Protections Of Section 222 Reside Primarily In The Prohibition On Disclosure Of CPNI To Third Parties.

While we agree with the Commission that Section 222 is intended both to protect privacy and to foster competition, we believe the privacy protection resides primarily in the prohibition on disclosure of CPNI to third parties without "affirmative written consent." Customers ordinarily do not view internal use of information to market new products as affecting their privacy interests; it is the disclosure of such information outside the business that often does not comport with a customer's expectations.

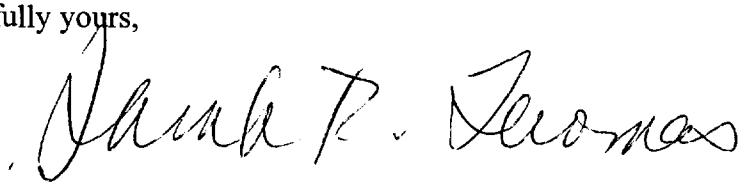
As we mentioned in our reply comments, there is a need for specific authorization from the Commission for sharing of end-user provisioning related information between outgoing and incoming carriers where resale services are involved. With that narrow exception, we encourage the Commission to adhere to a strict construction of the language of the Act, which specifically requires affirmative written consent for release of CPNI to a third party.

A Carrier's Affiliates Should Have Access to CPNI Under the Same Terms as the Carrier Itself

As for affiliates, nothing in Section 222 limits a carrier's right to share CPNI with an affiliate if it has the customer's "approval" to do so. "Approval" should be defined to include the notice and opt-out process we describe above. The carrier should be allowed to use the CPNI of customers who do not "opt out" to engage in any activities specified in the notice, including marketing activities across product categories and sharing such CPNI with the carrier's affiliates. Use of CPNI by affiliates is essential to achieve the benefits of competition described above, because many of the competitive services will be provided by affiliates.

We appreciate the opportunity to make our views known.

Respectfully yours,



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